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Supreme Court, U.S.
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No. 03-22

In the

Supreme Court of the United States

YVONNE G. TROUT, individually and on behalf of others similarly situated and CLARA A. PERLIGIERO,

Petitioners,

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER, NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENTS

Respondents do not address petitioners' central argument, that the application of Section 114(2) of the 1991 Act to *Trout* involves a "prospective" application of the statute. The Court should accept the petition because this issue raises "***a recurring question in the law***: When should a new federal statute be applied to pending cases?" *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (citations omitted) (emphasis added).

On September 30, 2003, the Court granted the Petition for Certiorari in *Republic of Austria v. Altmann*, No. 03-13. The Petition granted was limited to Question One, which involves the issue of whether the Ninth Circuit's holding that the application of the Foreign Sovereign Immunities Act to conduct occurring prior to the effective date of the statue is "prospective," rather than impermissibly "retroactive." *Altmann v. Republic of Austria*, 317 F. 3d 954, 964-965 (9th Cir. 2003). *See* Petition for *Certiorari* at 6-7, 9-10.

The Court of Appeals erred in reversing the District Court's award of interest on back pay awards to sixty-seven prevailing plaintiffs for "delay in payment" pursuant to the express waiver of sovereign immunity contained in Section 114(2) of the Civil Rights Act of 1991. On the effective date of Section 114(2) the *Trout* case was being fully litigated on the merits before the District Court.[1] Final judgment on liability was on

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[1]Respondents characterize petitioners' claim that *Trout* "was pending [in the district court] on the merits on November 21, 1991 as factually questionable." Opposition at 6. Since the liability phase of the litigation is not complete during the remedial state of a class action, and no final judgment was entered until the approval of the class action settlement, this assertion is incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J.,

November 22, 1993, two years after Section 114(2) became law.

I.

Respondents claim in conclusory fashion that the decision of the Court of Appeals denying full and adequate relief to the sixty-seven claimants does not conflict with any decision of this or other courts. Opposition at 5. Respondents also argue that the issue before the Court involves a narrow sub-set of civil rights cases that were pending on November 21, 1991, and that the issue of retroactive application of congressionally enacted waivers of sovereign immunity raised in *Trout* is "unlikely to arise with any frequency in the future." Opposition at 7. We disagree because the determination of whether a statute operates "prospectively" or "retroactively" is a recurring issue, as evidenced by the grant of review in *Altmann*, *supra*.

Respondents' unsupported assertion is entitled to no intellectual weight in view of the failure to discuss the majority of the cases discussed in the Petition for *Certiorari*. Respondents' decision not to even mention this Court's decisions in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990), and *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), or the Federal Circuit's decision in *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 751, 753, *reh'g denied* (Fed. Cir. 1997), should be read as an admission that these cases are fatal to respondents' position.

II.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court sought to reconcile two seemingly conflicting retroactivity principles. The *Landgraf* Court

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concurring). A case is pending until the court enters final judgment. *See Trout v. Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (Ginsburg, R.B. J.) (citation omitted)

specifically reaffirmed the continuing vitality of the holding in *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), "that a court is to apply the law in effect ***at the time it renders its decision***, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 277, quoting *Bradley*, at 711 (emphasis added). "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is ***not*** retroactive." *Id.* at 273. (Emphasis added.)

The mere fact that the new legislation requires reference to antecedent events or data, however, does not make its application retroactive. *Id.* at 269. The test for determining whether a statute operates "retrospectively" or "retroactively" is not at issue where the triggering event is not "completed" at the time "the court renders a decision." *Id.* at 269-270. This Court observed that: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (footnote omitted)

Rather, the Court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 269-70 (footnote omitted).

Whether an application of law dealing with the award of interest is "prospective" or "retroactive" "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum*,

supra, at 857 n. 3 (Scalia, J. concurring). A change in statute is not "retroactive," but is a "prospective" application as long as the event that triggers the application of the law occurs after enactment. *Id.* Under *Kaiser Aluminum*, the triggering or determinative event for the purposes of determining eligibility for prejudgment interest is the entry of judgment. Judgment is the final reckoning which determines whether there is liability and defines the basis upon which interest is due. *Id.* at 839. Judgment is the point at which "expectations with respect to interest liability were fixed." *Id.*

When *Landgraf* is read in light of the teachings of *Kaiser Aluminum* it is clear that the application of Section 114(2) of the Civil Rights Act of 1991 to the award of interest on judgments entered after the passage of the 1991 Act does not raise *bona fide* issues of retroactivity, because the triggering event, the entry of judgment in *Trout*, did not occur until after the effective date of the 1991 Act. *Kaiser Aluminum*, *supra*, at 827 (interest rate for judgment determined on the date of judgment). Thus, petitioners seek the "prospective" application of the statute as this term was defined by this Court in *Kaiser Aluminum* and *Landgraf*.[2]

By failing to follow *Landgraf* and *Kaiser Aluminum*, the court below erred in concluding that the triggering event was the conclusion of the liability phase of trial, rather than the entry of judgment. *Trout v. Secretary of the Navy*, 317 F.3d 286, 292 (D.C. Cir. 2003); App. 8a. Since the entry of judgment is the triggering event which determines whether a statute is retroactive, the application of Section 114(2) to the *Trout* litigation

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[2]*Landgraf's* multiple citations to *Kaiser Aluminum* leave no doubt of the continuing vitality of *Kaiser Aluminum*.

does not require a "retroactive" application of the statute, but a "prospective" application of that provision.

The issues raised in the Petition are far broader than the application of Section 114(2) of the Civil Rights Act of 1991 to a case pending on the merits in the District Court when the 1991 Act was passed. Rather, petitioners raised the question of the rules for determining whether new legislation applies to a pending case, *viz.*, whether the application of a statute to a pending case is "retroactive," rather than "prospective." As the Court noted, this is a "recurring question in the law." *Martin v. Hadix*, 527 U.S. at 352. We submit that this question of what events trigger the application of a statute to a pending case can not be answered without reference to *Kaiser Aluminum*, which was not cited by respondents or by the District of Columbia Circuit Court of Appeals.

III.

The Federal Circuit interpreted *Landgraf* and *Kaiser Aluminum* to hold that where the event triggering the application of the amended statute occurs after the passage of the amendment, the application of the statute is not "retroactive." *Travenol*, *supra*, at 754. In *Travenol*, the Federal Circuit ruled that the federal government was required to pay interest for periods prior to the passage of the Act, where the event triggering the application of the new statute occurs after the effective date of the statute. The Federal Circuit concluded that the change in the law relating to the award of interest against the federal government "***does not attach new legal consequences to any events that occur before liquidation because, being preliminary in nature, those events do not give rise to interest liability***." *Id.* at 753, n. 5 (emphasis added).

In *Travenol*, the Federal Circuit held that payment of interest ***by the federal government*** on sums deposited prior to the waiver of sovereign immunity was a "prospective" application of the law. In *Travenol*, the court held where the triggering event occurred after the date of enactment of the statute allowing payment of interest on funds deposited with the federal government prior to the passage of the statute allowing interest, this was not "retroactive" application of the statute. *Id.* at 751, 753.

The analysis of the D.C. Circuit in *Trout*, which relies on its "special rule" of statutory construction is directly contrary to that of the Federal Circuit. The Court should grant review to resolve the conflict as to when the application of a statute to pending matters is "prospective" and whether the District of Columbia Circuit erroneously resolved this issue by failing to consider the teachings of *Kaiser Aluminum*.

IV.

There is no dispute that rules of strict construction apply to the analysis of whether there is a waiver of sovereign immunity. Respondents concede, and the D.C. Circuit agreed, that Section 114(2) expressly waived the sovereign immunity of the United States. App. 22a-23a; *Trout*, 317 F.3d at 291, App. 8a. However, the D.C. Circuit failed to give full effect to congressional intent to waive the government's immunity from interest.

"In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy*, *supra*, at 326. Waivers of sovereign immunity are to be construed by the ordinary tools of statutory construction. *Block v. Neal*, 460 U.S. 289, 298 (1982) ("The exemption of the sovereign from suit involves

hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (Citations omitted.)

Under the ordinary rules of statutory construction, the plain language of the statute governs. That Congress intended to fully compensate the victims of unlawful discrimination is clear. Section 114(2) of the Civil Rights Act was passed to expressly overrule this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). *Landgraf, supra*, at 251. Since no interest can accrue against the United States [or any party] until judgment is entered and the judgment at issue here was entered two years after enactment of the Civil Rights Act of 1991, the plain meaning of Section 114(2) allows the payment of pre-1991 prejudgment interest on judgments entered in November 1993.

In the present case, the judgment giving rise to delay in payment was not entered before the 1991 Act was enacted and therefore the litigation was not "completed" until after the 1991 Act was passed. There can be no prejudgment interest in the absence of a judgment and there was no final determination that any back pay [and therefore any interest] was due prior to November 22, 1993. Only "on the date of judgment," *viz.*, November 22, 1993, were "expectations with respect to interest liability . . . fixed." *See Kaiser Aluminum, supra*, at 839 (refusing to apply amended post-judgment interest statute because right to interest became fixed at the date of entry of judgment). Because the "same interest " provision of the Civil Rights Act of 1991 can only logically apply to cases where judgment on the merits has not been entered prior to enactment, the "prospective" application of the statute is necessary to pay the full amount of interest on ***post***-Act judgments

in order to adhere to the congressional mandate contained in Section 114(2) of the 1991 Act.

V.

Instead of applying the "normal rules" of statutory construction in analyzing the plain language of the acknowledged waiver of sovereign immunity contained in Section 114(2), the D.C. Circuit applied its own "special rule," first articulated in *Brown v. Secretary of Army*, 78 F.3d 645, *reh'g denied*, 86 F.3d 225 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996), for interpreting statutes containing waivers of sovereign immunity.[3] The District of Columbia's rule of decision created in *Brown* and applied in *Trout* imposed "an added gloss of strictness" on the usual rules governing analysis of waivers of sovereign immunity. Under the rulings of this Court, there is no basis for the "added gloss of strictness" or the "special rule" for analyzing express waivers of sovereign immunity. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (citations omitted.); *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (citations omitted). The rule of strict construction applies only when there is ambiguity in the waiver of sovereign immunity. *See, e.g., Shaw, supra*, at 318; *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). There is no such ambiguity present here.

The statutory interpretation of the scope of waivers of sovereign immunity is potentially raised each

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[3]Respondents' heavy reliance on *Brown* is misplaced because that case was no longer pending on the merits when the Civil Rights Act of 1991 became law. As the *Brown* panel observed "litigation on the merits of Brown's claim was ***completed*** and the attorney's fee incurred before the statute became effective." *Id.* at 654 (emphasis added). Mr. Brown obtained a final District Court Judgment "on the merits" in 1989 and this judgment was affirmed "on the merits" by the Court of Appeals in 1990.

and every time Congress consents to suit by legislation. This Court should provide guidance to the lower courts as to whether an acknowledged waiver of sovereign immunity of the United States is to be analyzed under principles articulated in *Kaiser Aluminum* and *Landgraf* or whether the D.C. Circuit's "special rule" for interpreting waivers of sovereign immunity applies. As the D.C. Circuit itself recognized "there remains considerable confusion about the relationship between that ***special rule*** and the principles governing the retroactivity of statutes in general." *Brown*, *supra*, at 654 (emphasis added) (citations omitted) In light of this "considerable confusion," the Court should grant review.

VI.

Respondents concede that Section 114(2) applies to *Trout*, App. at 22a-23a, but claim that the waiver is only a partial waiver of sovereign immunity. There is no authority to support this novel "partial waiver" theory, which defies the clearly expressed will of Congress and the plain language of the statute. The partial waiver of sovereign immunity created by the Court of Appeals below does not appear in the statutory text and, unless the text of the statute is ambiguous, its language is controlling. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). There is no ambiguity in the text which would support the conclusion that the language of Section 114(2) contains only a partial waiver of sovereign immunity.

It is indeed ironic that the Court of Appeals felt constrained to interpret an unambiguous, express waiver of sovereign immunity, which concededly applies to the *Trout* litigation, in a manner which denied full relief to sixty-seven victims of unlawful sex discrimination in order to protect the government fisc, where the delay in payment was caused by respondents'

"bad faith" litigation tactics. Petition at 3-5. The Court should grant the petition to correct the D.C. Circuit's erroneous conclusion that there could be a partial waiver of sovereign immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve a legal issue of importance regarding the identification of the triggering event which determines whether the application of a statute is "prospective" and to resolve the conflict between the D.C. Circuit's decision below and that of the Federal Circuit in *Travenol* as to whether the entry of Judgment is the triggering event for determining when the application of a statutory amendment to pending cases is "prospective."

The Petition should also be granted to answer the fundamental questions of whether the D.C. Circuit's "special rule" of second-level strict statutory analysis is required to analyze unambiguous congressional waivers of sovereign immunity.

Respectfully submitted,

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